

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANKLIN F. LUGO,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.

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No. 08 Civ. 2960 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

On May 19, 2008, the Court conducted a pre-motion conference with the parties to discuss defendant's proposed motion to dismiss or, in the alternative, motion for summary judgment. At that conference, the Court reserved decision on (1) the appropriate standard of review; and (2) whether limited discovery was required before the motion was briefed.

The Court holds that the appropriate standard of review in an action such as this one, where the plaintiff has conceded the violations underlying the penalties imposed by the United States Department of Agriculture's Food and Consumer Service division ("FCS"), is whether the decision of FCS was arbitrary and capricious. In so holding, the Court agrees with the rationale of other courts in this district that have addressed this issue. *See Ai Hoa Supermarket, Inc. v. United States*, 657 F. Supp. 1207, 1208 (S.D.N.Y. 1987); *Nagi v. USDA*, No. 96 Civ. 6034 (DC), 1997 WL 252034, at *3 (S.D.N.Y. May 14, 1997); *Yafaie v. United States*, No. 94 Civ. 7825 (KMW), 1995 WL 422169, at *1 (S.D.N.Y. July 18, 1995); *De La Nueces v. United States*, No. 91 Civ. 6664 (WCC), 1992 WL 58851, at *2 (S.D.N.Y. Mar. 16, 1992).

Additionally, plaintiff's request for discovery prior to briefing of the motion is denied. Again, the Court agrees with the courts in this district that have held that "when the agency's

action adheres to the guidelines, it may not be overturned as arbitrary or capricious.” *De La Nueces*, 1992 WL 58851, at *2 (citing *Otto v. Block*, 693 F.2d 472, 474 (5th Cir. 1982) and *Ai Hoa Supermarket*, 657 F. Supp. at 1208); *see also Nagi*, 1997 WL 252034, at *3; *Yafaie*, 1995 WL 422169, at *1. As such, the Court sees no need for discovery prior to decision on the motion, provided defendant’s motion contains an affidavit that attaches and references any relevant administrative guidelines or policies.

Accordingly, defendant’s motion for summary judgment shall be filed and served on or before June 27, 2008. Plaintiff’s opposition papers shall be filed and served on or before July 25, 2008. Defendant’s reply papers, if any, shall be filed and served on or before August 1, 2008.

SO ORDERED.

Dated: May **28** 2008
New York, New York


RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE